



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NYAMBUYE, G.B.M. KARIUKI & MURGOR JJA

CIVIL APPLICATION NO. NAI. 339 OF 2014

BETWEEN

ANDREW NKIIRI THIRINJA.....1ST APPLICANT

NEWTON KAMAU NGETHE.....2ND APPLICANT

KAMAU MUCHUHA.....3RD APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE.....2ND RESPONDENT

An application for stay of execution of the Judgment and decree of the

High Court of Kenya at Nairobi by Korir J, dated 2nd May 2013

in

JR MSC Application No 373 of 2010)

RULING OF THE COURT

By way of a Notice of Motion dated 4th July 2013 and an amended Notice of Motion lodged on 24th June 2014 following an order of this Court allowing the applicant's to replace the name of the Attorney General, with the name of the Director of Public Prosecutions, the applicants have sought a stay of execution of the decision of Korir J in the High Court delivered on 2nd May 2013 and a stay of further proceedings in the Chief Magistrate's court in *Criminal Case No. 542 of 2010 Kiambu* pending the hearing and determination of the appeal.

The brief facts of the case are that the applicants, *Andrew Nkiiri Thirinji, Newton Kamau Ngethe* and *Kamau Mucuha* were charged in *Criminal Case No. 542 of 2010* with intent to defraud by means of

registering a private company namely Mega Microfinance Company Limited purporting to be the Mega Micro Finance Company Limited that belonged to contributor members of Mega Initiative Welfare Society, and that on diverse dates by uttering of false documents the applicants attempted to obtain Kshs. 32 Million from Mega Initiative Welfare Society as the officials of Mega Microfinance Limited.

In a Notice of Motion dated 2nd August 2010, the applicants sought orders of certiorari under Judicial review to quash and annul the decision to charge the applicants in **Criminal Case No. 542 of 2010** and an order of prohibition against the hearing of the aforementioned criminal case by the 2nd respondent.

The High Court in dismissing the application found that the applicants had neither placed any evidence before it to support the contention that they had been arraigned maliciously, nor that the rules of natural justice had been breached nor that the respondents had abused their constitutional or statutory powers.

Being dissatisfied with the decision of the Judicial review court, the applicant filed this application which is before us under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders that:-

1. *That this application be certified urgent.....*
2. *That pending the hearing and determination of the applicants appeal, the execution of the decision of W.M. Korir, J delivered on 2nd May 2013 in the high Court Miscellaneous Application No 373 of 2010 be stayed;*
3. *That pending hearing and determination of the application interparty, there be a stay of any further proceedings in the chief magistrate's court in Kiambu Chief Magistrate's Case No 542 of 2010 any other consequential steps in the proceedings before the lower court.*

The application before us is advanced by way of five grounds and is supported by the sworn affidavit of **Newton Kamau Ngethe** who has deponed that he is one of the directors of Mega Microfinance Company Limited who had been arrested and charged together with the 2nd and 3rd applicants in **Criminal Case No 542 of 2010 Kiambu**. The 1st applicant contended that the allegations in the charge sheet were untrue, as the money was transferred from Mega Initiative Welfare Society and Mega Bank to the account of Mega Microfinance Limited, but that this had been effected pursuant to a resolution passed by all paid members of Mega Welfare Society. He further stated that at the time of being arrested, no investigations had been carried out, and on 15th April 2010 the prosecution had applied in the Chief Magistrates court to withdraw the case, which the Chief Magistrate declined to do. The 1st applicant stated that since then, the Director of Criminal Investigations has completed the investigations and had sought to withdraw the case in a letter dated 26th April 2010 addressed to the officer- in- charge of prosecutions Kiambu Law Courts. The 1st applicant concluded that they will suffer irreparable reputational damages as directors of financial institutions if the case were to proceed to trial, and that in any event, the case should be terminated as it is a waste of judicial time and resources.

When the application came up for hearing, there was no appearance for the respondents though they had been served with a Hearing Notice as required. On his part, **Mr. Wandugi**, learned counsel for the applicants commenced his submissions by informing us that the hearing of **Criminal Case No. 542 of 2010 Kiambu** was due to commence on **23rd October 2014**. Counsel submitted that the Notice of Motion dated 4th July 2013 was arguable as, the respondents, despite being served with the application, had not filed a replying affidavit and had not opposed the application for stay of execution. Counsel continued that, the learned judge was wrong in holding that no evidence was placed before the High Court to support the allegations, that the applicants had been arraigned in court maliciously, or that there had been an abuse of the criminal process. Counsel contended that the institution of criminal proceedings was flawed, as the applicants were not confronted with the allegations, and were not afforded a reasonable opportunity to be heard before the decision to charge them was made. Counsel further stated that the prosecution did not conduct investigations into the allegations, yet, a subsequent Investigation report of James Mutua, had concluded that no moneys were found to have been stolen. Regarding the second limb

on whether the appeal would be rendered nugatory if it was to be successful, counsel submitted that, should this Court decline to grant a stay of execution of the orders of High Court, the mere fact of the submitting the applicants to the criminal process would render the appeal nugatory, and subject the applicants to irreparable and irreversible damage to their reputations. Counsel prayed that the application be allowed.

This application is brought under **rule 5 (2) (b)** of this Court's Rules, where the requirements to obtain the orders as sought are undoubtedly well settled. It is original and discretionary. For an applicant to succeed, twin guiding principles must be satisfied, first, that the intended appeal is arguable, and it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the cases of *Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838, J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88) 1 KAR 1688, Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 98 of 2002 (unreported) and Al-Mahra Limited vs. Premier Foods Industries Limited – Civil Application No. Nai. 163 of 2006.*

Contrary to the view taken by Mr. Wandugi that since the application is unopposed it must succeed, we hasten to reiterate that, for the applicant to succeed the twin limbs must be fulfilled, and that the fulfilment of one condition without the other is not sufficient.

Having said that, we have perused and considered the draft memorandum of appeal that was annexed to this Notice of Motion. We have also considered anxiously the ruling of the High court the subject of this application the submissions by counsel for the applicants, and find without delving into the merits of the intended appeal, the matters raised are not frivolous. That is not to say they will succeed on appeal, but, that they are certainly arguable.

Turning to whether the appeal would be rendered nugatory in the event it is successful, we consider that this aspect is not satisfied. The High Court made a finding that there was no evidence placed before it to show malice, or abuse of constitutional or statutory powers as alleged by the applicants. The court did not order the applicants or the respondents to do any act or to abstain from doing anything for which a stay of execution was necessitated. As a consequence, there is nothing capable of being stayed by this Court. The predecessor to this Court made this clear in the oft cited case of *Western College of Arts and Applied Sciences vs. Oranga & Others (1976) KLR 63.* The High Court merely dismissed the applicant's application and this Court cannot stay a dismissal order.

This notwithstanding, **section 193A** of the **Criminal Procedure Code** is concerned with the issue of pending criminal and civil proceedings, and which stipulates:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

Accordingly, we find no merit in the motion dated 4th July 2013 which we hereby dismiss. We order that costs in the motion shall be in the appeal.

Dated and Delivered at Nairobi this 17th day of October, 2014

R. N. NAMBUYE

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR